In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-360

HENRY FORREST MARSHALL, PETITIONER

v.

UNITED STATES OF AMERICA

No. 75-5391

ROBERT DEMPSEY, III, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of Louisiana, petitioners were convicted of conspiring, in violation of 21 U.S.C. 846, to possess and distribute cocaine in violation of 21 U.S.C. 841(a)(1); petitioner Marshall was additionally convicted on two substantive counts charging distribution of cocaine, in violation of 21 U.S.C. 841(a)(1). Marshall was given concurrent sentences of twelve years' imprisonment and a three-year special parole term on each count; petitioner Dempsey was sentenced to four years' imprisonment, consecutive to

an eight-year sentence he was then serving on another conviction, and a three-year special parole term. The court of appeals affirmed (Pet. No. 75-360, Apps. A, B).

Both petitioners contend that, under Wharton's Rule, their conviction for the substantive offenses barred conviction for the conspiracy. Marshall separately contends that the trial court erred by refusing his proffered instruction based upon Wharton's Rule and by denying him a mistrial because during cross-examination he was required to read aloud a federal firearms transaction form on which he had falsely denied being a narcotics user. Dempsey separately claims that his conviction for conspiracy constituted double jeopardy, since he had previously pleaded guilty to an indictment charging him with substantive offenses growing out of the same transaction.

1. The evidence showed three sales of cocaine by Dempsey to government informant Leonard Martin (the basis for the substantive indictment to which Dempsey previously pleaded guilty); a sale of cocaine by Marshall to one Booker T. Howard, Jr. (a co-defendant who pleaded guilty and testified as a government witness), which Howard resold in Chicago; and two sales of cocaine by Marshall to an undercover agent and another informer, Frederick Smith, which were arranged by Howard. A Drug Enforcement Administration chemist testified that the cocaine involved in the three sales to Martin and the two sales to Smith appeared to have a common source (II R. 84-89). Martin testified that Dempsey had identified Marshall as the source of the cocaine involved in one of Martin's purchases (II R. 126-128). Moreover, Dempsey had visited Marshall's apartment immediately prior to two of his sales to Martin (II R. 117-122, 193-198).

Petitioners do not dispute that from this evidence the jury could reasonably infer that Marshall provided the cocaine which Dempsey sold to Martin (see Pet. No. 75-5391 at 14-

15; Pet. No. 75-360 at 9). Their claim, instead, is that there was no showing that Marshall understood Dempsey to be other than an ultimate purchaser, and that under Wharton's Rule a buyer and seller cannot be guilty of a conspiracy to distribute. Marshall seeks to bring his own sales to Smith and the undercover agent within Wharton's Rule on the ground that Howard, because he was paid $200 by the undercover agent for arranging the sale, acted as the purchasers' rather than as Marshall's agent.

A. As recently explained in *Iannelli* v. *United States*, 420 U.S. 770, Wharton's Rule is an exception to the principle that conspiracy and the completed substantive offense are separate crimes. It is more a concept than a rule. *Id.* at 776. Under it, an agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as necessarily to require the participation of two persons for its commission. In effect, the conspiracy is deemed to be merged into the substantive violation. *Id.* at 777-782. The Rule has been traditionally applied where agreement is essential to the substantive offense, and only the parties to the agreement are harmed. *Id.* at 782-784. *Iannelli* defines it as nothing more than a judicial presumption to aid statutory construction. It does not rest on double jeopardy concepts (*id.* at 782), and it is given effect only absent legislative intent to treat the substantive offense and the conspiracy as discrete crimes. *Id.* at 784-785.

In this case, the district court (VI R. 63) and the court of appeals (Pet. No. 75-360, App. A, 5755) correctly held that Wharton's Rule is inapplicable, and that no instruction concerning it was necessary. Contrary to petitioners' assumption, the substantive offense for which they were indicted—distribution of narcotics (21 U.S.C. 841)—does not require proof of agreement; the

offense of conspiracy to violate the Controlled Substances Act (21 U.S.C. 846) does require such proof. Distribution means "to deliver" (21 U.S.C. 802(11)) and "deliver" means "the actual, constructive, or attempted transfer of a controlled substance, whether or not there exists an agency relationship" (21 U.S.C. 802 (8)). The government need not prove that the actual or putative transferee consented to receive the contraband, although in most cases this will in fact be so. "Wharton's Rule applies only to offenses that *require* concerted criminal activity" (420 U.S. at 785; emphasis by the Court). Thus, because both crimes do not require proof of agreement, the existence, in a particular case, of substantial overlap in the proof offered to establish them does not defeat the inference that Congress intended to impose separate sanctions for separately defined offenses (*id.* at 785, n. 17).

The inference is even stronger here than in *Iannelli.* That case involved only the general conspiracy statute (18 U.S.C. 371) and a multiple-party gambling offense. In this case, however, the charge is violation of the special conspiracy provision Congress included in the Controlled Substances Act in addition to the substantive offenses defined in Section 841. Moreover, the harm resulting from agreements involving narcotics, like the gambling offenses involved in *Iannelli,* extends far beyond the parties to the agreement, and thus beyond the traditional rationale for Wharton's Rule. See 420 U.S. at 784. These factors indicate that Congress intended that conviction of the substantive offense, on proof in the particular case of collective criminal activity, does not dispense with liability for the conspiracy.

B. The evidence was sufficient to establish conspiracy as well as distribution. It was for the jury to decide

whether Howard's arrangement of the sale by Marshall to Smith and the undercover agent reflected an understanding between Marshall and Howard. Compare *United States* v. *Toombs*, 497 F. 2d 88, 94-95 (C.A. 5). As for the sales by Dempsey, the jury could reasonably infer from the circumstances, including the dates and frequency of the transactions (December 21, 1972, January 16 and January 19, 1973) and the amount involved (5.52 grams, 10.605 grams and 20.196 grams respectively), that Marshall was aware that Dempsey's purchases from him were not solely for personal use, but rather were for the purpose of further distribution.

2. Dempsey's conviction for conspiracy after previously having been convicted on his guilty plea of distribution, did not constitute double jeopardy. Conspiracy is a separate offense which is separately punishable. *Iannelli*, *supra*, 420 U.S. at 777-778; *United States* v. *Feola*, 420 U.S. 671, 693; *Callanan* v. *United States*, 364 U.S. 587, 593. There is no requirement that all offenses growing out of the same transaction be included in the same indictment and tried together, particularly when they involve different elements.[1] *Pulley* v. *Norvell*, 431 F.2d 258, 261 (C.A. 6), certiorari denied, 401 U.S. 916; *United States* v. *Smith*, 470 F.2d 1299, 1302 (C.A. 5), certiorari denied, 411 U.S. 952; *Moton* v. *Swenson*, 488 F.2d 1060, 1061-1063 (C.A. 8); *New Mexico* v. *Tijerina*, 86 N.M. 31, 519 P.2d 127, certiorari denied, 417 U.S. 956; *Wells* v. *Missouri*, 504 S.W. 2d 96 (Mo.), certiorari denied, 419 U.S. 1075.

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[1]Since petitioner pleaded guilty to the substantive offenses, he cannot claim collateral estoppel under *Ashe* v. *Swenson*, 397 U.S. 436.

3. The federal firearms transaction form was introduced into evidence to impeach Marshall's credibility; he had admitted on cross-examination that he was a narcotics user, and in executing the form he had denied using narcotics. The trial court instructed the prosecutor to make no further reference to the document, and instructed the jury that the testimony relating to it was to be considered only in regard to Marshall's credibility (see Pet. No. 75-360, App. A, 5755-5756). In view of the direct evidence linking Marshall to the sale of cocaine to the undercover agent and Smith, the court of appeals correctly concluded that no reversible error occurred (*id.* at 5756).

For the foregoing reasons, it is respectfully submitted that the petitions for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

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